

Judge Foerschler found claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on April 8, 1999. Temporary total disability compensation was denied, but permanent partial general body disability compensation was awarded based upon a 10 percent impairment of function. During oral argument to the Board, respondent conceded that claimant sustained injury by accident arising out of and in the course of his employment with respondent. But respondent argues claimant has no permanent disability from the accidental injury at work and therefore permanent partial disability compensation should be denied. In the alternative, respondent contends that if there is any permanent impairment attributable to claimant's work related injury, the only credible opinion regarding impairment is the 5 percent rating by Dr. Phillip

Mills. Finally, respondent submits Judge Foerschler was correct in determining that claimant failed to prove entitlement to temporary total disability compensation.

Conversely, claimant contends that his work related accident resulted in a 12 percent permanent impairment pursuant to the testimony of Dr. Edward Prostic. In addition, claimant seeks temporary total disability compensation from the "date of accident until the time of the termination of his work hardening."

At the time of the December 19, 2000 regular hearing, claimant was working construction as a carpenter, performing all of the physical demands of that job and earning \$10.00 an hour as compared to the \$7.00 per hour claimant earned working for respondent. Consequently, there is no claim for a work disability.

The nature and extent of claimant's permanent disability, if any, and claimant's entitlement to temporary total disability benefits are the only issues for Appeals Board review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and having considered the briefs and arguments of counsel, the Appeals Board finds that the Award should be modified to deny claimant permanent partial disability compensation. The Award should otherwise be affirmed.

Claimant worked at respondent's auto salvage yard. His job duties mainly involved removing parts from vehicles. He had been working for respondent about three weeks when, on April 8, 1999, claimant was injured lifting an automatic transmission. On that date claimant was directed to load two automatic transmissions onto a truck. Claimant described these automatic transmissions as weighing approximately 100 pounds. Claimant loaded the first transmission without incident but as he picked up the second transmission claimant lost his balance and twisted his back. He heard a cracking sound and immediately felt pain in his low back, hip and testicles.

Claimant informed one of his supervisors, Les Morse, who was also one of the owners of the salvage yard, that he had suffered an injury. Claimant then drove home and had his wife call Mr. Morse about where he should go for medical treatment. She was advised that it did not matter and so took claimant to the Anderson County Hospital where he was examined and treated by Dr. Albert Geisen.

Claimant returned to Dr. Geisen a week later on April 15, 1999. At that time claimant was complaining primarily of pain in his abdomen and urinary problems. Dr. Geisen's notes indicate that claimant had a little residual back pain but that it was minimal. Dr. Geisen diagnosed a non-work-related prostate problem for which he gave claimant a prescription.

Claimant saw Dr. Geisen again on April 22, 1999, at which time claimant stated that he had injured his back lifting boxes the night before while cleaning out his truck. Claimant

disputes suffering any subsequent injuries and states that he was merely relating to Dr. Geisen examples of activities which caused him problems. On examination claimant had tenderness in the sacroiliac region but was able to ambulate without difficulty. Dr. Geisen diagnosed low back pain/sacroiliitis and prostatitis.

The last record of Dr. Geisen in evidence is for a May 6, 1999 office visit. For the first time there is a mention of radicular pain down claimant's right leg. According to these office notes, claimant described experiencing this pain for three days following the activity of mowing his yard and helping a friend work on an automobile engine.

Claimant describes unsuccessful attempts to obtain additional treatment from Dr. Geisen. Eventually claimant was referred to orthopedic surgeon Edward Prostic, M.D. Claimant first saw Dr. Prostic on February 1, 2000. X-rays taken by Dr. Prostic's office showed fairly severe degenerative disc disease at L4-5 and L5-S1. He diagnosed a severe sprain and strain of the lumbar spine. He further testified that claimant had symptoms at his second examination that he did not have at the first examination. He described those new symptoms as compatible with disk herniation at L4-5 or L5-S1 or of an aggravation of degenerative disk disease with lateral recess stenosis. He prescribed work hardening which claimant completed on June 2, 2000. He was released from Dr. Prostic's care with permanent restrictions on June 13, 2000. Using a range of motion method, Dr. Prostic rated claimant's impairment at 12 percent but using the DRE model would have given claimant a 7 percent impairment. Based upon the history he was given, Dr. Prostic related claimant's condition to the April 8, 1999 work related accident. But after reviewing Dr. Geisen's notes, Dr. Prostic changed his opinion and testified that he could not say whether or not claimant's injury occurred at work.

Claimant was also examined by board certified physiatrist Phillip R. Mills, M.D. Dr. Mills diagnosed low back sprain with SI involvement and preexisting degenerative arthritis. He rated claimant's permanent impairment at 5 percent using the DRE model of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He recommended claimant change positions as needed, avoid trunk swivel and work only with meticulous body mechanics. Although Dr. Mills initially related claimant's injury and impairment to his April 8, 1999 accident, he subsequently testified that he could not state this to a reasonable degree of medical probability because of the conflict between claimant's history and Dr. Geisen's records.

The Board finds claimant has failed to prove that his permanent impairment of function was caused by the April 8, 1999 accident.

Claimant seeks temporary total disability compensation from April 8, 1999 until he completed work hardening on June 2, 2000, a period of 60.14 weeks. In support, claimant points out that he was taken off work by Dr. Geisen and never released to return to work. In his brief, claimant contends he ". . . understood that during this time period, he was to remain off work. Thus, the Claimant has been temporarily totally disabled from the date of accident until the time of the termination of his work hardening."

Claimant's Exhibit 2 to the December 19, 2000 Regular Hearing is a note dated April 8, 1999 by Dr. Geisen which states "Mr. Alford should be released from work until rechecked." Claimant was rechecked by Dr. Geisen on April 15, 1999. There is no evidence that Dr. Geisen ever issued another off-work slip. Dr. Geisen's records were introduced without objection as part of Respondent's Exhibit 1 to Dr. Prostic's January 12, 2001 deposition. The records of claimant's April 15, 1999, April 22, 1999 and May 6, 1999 office visits with Dr. Geisen are silent concerning claimant's work status. But Dr. Geisen's findings during those examinations are not indicative of a patient who is unable to work. Claimant has only established that he was temporarily and totally disabled one week, from April 8, 1999 through April 15, 1999. Pursuant to K.S.A. 44-510c(b)(1) an injured worker must be totally disabled for three consecutive weeks before he is entitled to temporary total disability compensation for the first week of disability. Accordingly, the Board finds that temporary total disability compensation should be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated May 3, 2001, should be, and is hereby, modified to deny permanent partial disability compensation, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director